

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

15 JUN -2 PM 12: 53

OFFICE OF THE CLERK

RANDALL S. KRAUSE,
Plaintiff,

v.

CITY OF OMAHA,
Defendant.

8:15CV197

COMPLAINT

INTRODUCTION

1. This is a citizen suit for declaratory and injunctive relief under § 7002(a)(1)(A) of the Resource Conservation and Recovery Act ("RCRA") against the City of Omaha (the "City") for violating the prohibition against open dumping in RCRA § 4005(a) and 40 CFR § 257.3-1(a).

2. Plaintiff Randall S. Krause ("Plaintiff") seeks a declaration that the City's application of sodium chloride ("NaCl") and sodium ferrocyanide ("NaFe(CN)") on the sections of Carter Lake Shore Dr. W and Carter Lake Shore Dr. N ("the streets") that are in a floodplain adjacent to Carter Lake constitutes open dumping. Plaintiff also seeks an injunction enjoining the City from applying NaCl and NaFe(CN) on the sections of the streets that are in a floodplain.

JURISDICTION

3. This Court has subject matter jurisdiction pursuant to RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A).

4. The Court also has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under RCRA, 42 U.S.C. §§ 6901-6992k, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

5. On March 31, 2015, by registered mail, return receipt requested, Robert G. Stubbe, the director of the City's Public Works Department, received an amended notice of the Plaintiff's intent to sue. On April 2, 2015, by registered mail, return receipt requested, Mr. Stubbe received a second amended notice, which supplemented the first amended notice. Exhibits A and B. Mr. Stubbe controls and directs all work upon the public streets, alleys, and public ways in the City. The amended notices were sent to him in accordance with 40 CFR 254.2(a)(2). The Plaintiff also mailed a copy of the amended notices to the Administrator of the United States Environmental Protection Agency ("EPA"), the Regional Administrator for EPA Region 7, and the Administrator of the Nebraska Department of Environmental Quality Waste Management Division as required by 40 CFR § 254.2(a)(2).

6. Sixty days have passed since Mr. Stubbe received the second amended notice and no one from the City has communicated with the Plaintiff about the violations complained of in the notices. The City will likely continue open dumping on the sections of the streets in a floodplain. Neither EPA nor the state of Nebraska is diligently prosecuting a civil or criminal action to redress the violations.

VENUE

7. Venue properly vests in this Court pursuant to 28 U.S.C. § 1391 because the alleged violations of RCRA occurred and continue to occur within the state of Nebraska.

PARTIES

8. Defendant, City of Omaha, is a political subdivision and city of the metropolitan class of the state of Nebraska.

9. Plaintiff, Randall S. Krause, resides in Omaha, Nebraska.

10. Plaintiff enjoys visiting Carter Lake and he wants to protect the area for future generations.

STATUTORY AND REGULATORY FRAMEWORK

11. 42 U.S.C. § 6972(a)(1)(A) provides that citizens may commence a citizen suit “against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA].”

18. 42 U.S.C. § 6901(b) states that “disposal of solid waste... in or on the land without careful planning and management can present a danger to human health and the environment;” and that “open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land...”

19. The purpose of RCRA is “to promote the protection of health and the environment.” RCRA seeks to accomplish this by “prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health...” 42 U.S.C. § 6902(a).

20. RCRA prohibits “any solid waste management practice or disposal of solid waste... which constitutes the open dumping of solid waste...” RCRA § 4005(a), 42 U.S.C. § 6945(a).

21. RCRA defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities...” 42 U.S.C. § 6903(27).

22. As required by RCRA in 42 U.S.C. § 6907(a)(3), EPA promulgated criteria defining solid waste management practices that constitute open dumping. See 40 CFR

Parts 257 and 258. These regulations outline certain solid waste disposal practices, which if violated pose a reasonable probability of adverse effects on health or the environment. 40 CFR § 257.3.

23. Regarding illegal solid waste disposal practices, 40 CFR § 257.3-1(a) states that “Facilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.”

24. The term “floodplain” is defined in 40 CFR § 257.3-1(b) as “the lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, which are inundated by the base flood.”

25. The term “base flood” is defined in 40 CFR § 257.3-1(b) as “a flood that has a 1 percent or greater chance of recurring in any year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.”

26. The term “washout” is defined in 40 CFR § 257.3-1(b) as “the carrying away of solid waste by waters of the base flood.”

FACTS

27. Since at least the 2013-14 winter season, it has been the City’s practice to apply NaCl and NaFe(CN) to the streets for snow and ice control during the winter season.

28. The streets do not have curbs or storm drains.

29. The NaCl and NaFe(CN) remain on the streets until runoff carries them to the dirt shoulders that line the streets.

30. Once NaCl and NaFe(CN) are on the dirt shoulders, they can no longer serve their intended purpose and they are not recovered.

31. Runoff disposes of the NaCl and NaFe(CN) by carrying them off the streets.
32. After being disposed of by runoff, the NaCl and NaFe(CN) constitute solid waste under RCRA.
33. Panel 0241H of the Flood Insurance Rate Map for Douglas County, Nebraska prepared by the National Flood Insurance Program for the Federal Emergency Management Agency shows that one long and one short section of Carter Lake Shore Dr. W are in a floodplain and all of Carter Lake Shore Dr. N is in a floodplain. The long section of Carter Lake Shore Dr. W that is in a floodplain starts at approximately 41°17'20"N, 095°55'49"W in the south and ends at approximately 41°17'47"N, 095°55'54"W in the north. The short section of Carter Lake Shore Dr. W that is in a floodplain starts at approximately 41°17'59"N, 095°55'52"W in the south and ends at approximately 41°18'01"N, 095°55'51"W in the north. Exhibit B.
34. If the base flood inundated the floodplain, NaCl and NaFe(CN) would be carried away by waters of the base flood, which constitutes a washout of solid waste.
35. NaCl is a known hazard to wildlife, land, and water resources. NaFe(CN) is a known hazard to wildlife.

RELIEF REQUESTED

36. Plaintiff asks the Court to declare that the City's application of sodium chloride and sodium ferrocyanide on the sections of Carter Lake Shore Dr. W and Carter Lake Shore Dr. N that are in a floodplain constitutes open dumping under RCRA. Plaintiff also seeks an injunction enjoining the City from applying NaCl and NaFe(CN) on the sections of the streets that are in a floodplain.

TRIAL METHOD

37. Plaintiff requests a bench trial.

VERIFICATION

38. I declare under penalty of perjury that the foregoing is true and correct.

6/2/2015
Date Executed

Randall S. Krause

Randall S. Krause
604 S. 22nd St. Apt. 515
Omaha, NE 68102
Telephone No. (402) 206-7045
Email: krause_randall@hotmail.com

Randall S. Krause
604 S. 22nd Street, Apt. 515
Omaha, NE 68102
Ph. (402) 206-7045
Email: krause_randall@hotmail.com

By Registered Mail, Return Receipt Requested

March 30, 2015

Robert G. Stubbe, Director
City of Omaha Public Works Department
1819 Farnam Street, Suite 600
Omaha, NE 68183

Re: Amended Notice of Intent to Sue

Dear Mr. Stubbe:

This amended notice replaces the original notice of intent to sue dated March 17, 2015. Sixty days after you receive this amended notice, Randall S. Krause ("Krause") intends to file a citizen suit under § 7002(a)(1)(A) of the Resource Conservation and Recovery Act ("RCRA") against the City of Omaha (the "City") in the U.S. District Court for the District of Nebraska for violating the prohibition against open dumping in RCRA § 4005(a) and 40 CFR § 257.3-1(a). This notice is being sent to you because you control and direct all work upon the public streets, alleys, and public ways in the City.

Since at least the 2013-14 winter season, it has been the City's practice to apply sodium chloride ("NaCl") and sodium ferrocyanide ("NaFe(CN)") to Carter Lake Shore Dr. W and Carter Lake Shore Dr. N (the "streets") for snow and ice control. The NaCl and NaFe(CN) remain on the streets until runoff carries them off. The streets do not have curbs or storm drains. Runoff deposits the NaCl and NaFe(CN) on the dirt shoulders that line both streets.

Once NaCl and NaFe(CN) are on the dirt shoulders, they can no longer serve their intended purpose and they are not recovered. Runoff disposes of the NaCl and NaFe(CN) by carrying them off the streets. After being disposed of by runoff, the NaCl and NaFe(CN) constitute "solid waste" under RCRA.

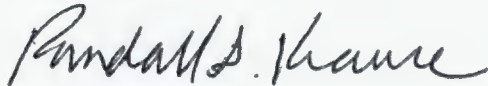
Long sections of Carter Lake Shore Dr. W and all of Carter Lake Shore Dr. N are in a floodplain adjacent to Carter Lake. (See the attached map). As required by RCRA § 1008(a)(3), EPA promulgated minimum criteria defining solid waste management practices that constitute the open dumping of solid waste. See 40 CFR § 257.3. One of the criteria is

that "Facilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources." 40 CFR § 257.3-1(a).

Because NaCl and NaFe(CN) are sitting on the street's dirt shoulders, if the base flood inundated the floodplain adjacent to Carter Lake, NaCl and NaFe(CN), which are highly soluble in water, would be carried away by waters of the base flood. NaCl is known to be a hazard to wildlife, land, and water resources. And NaFe(CN) is a known hazard to wildlife.

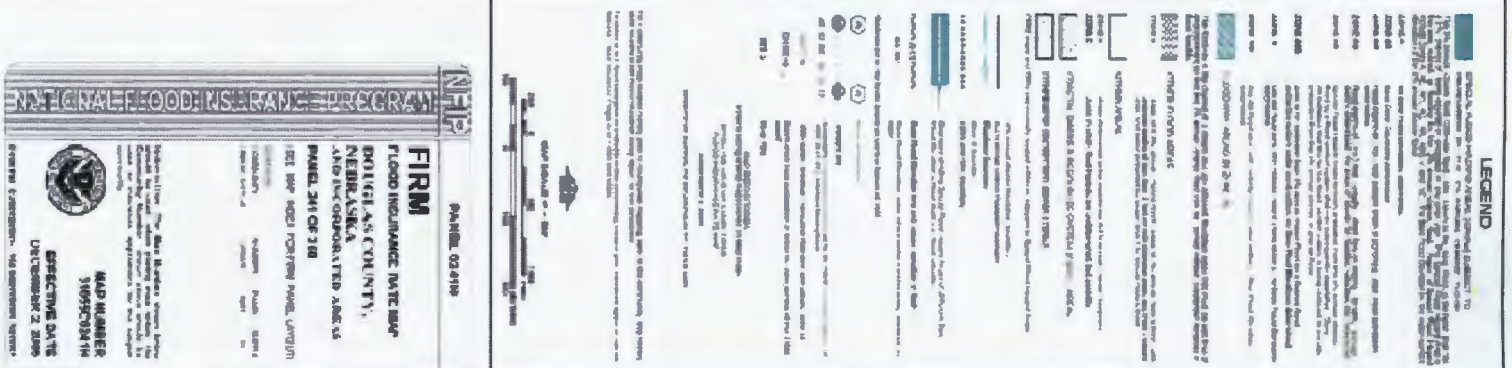
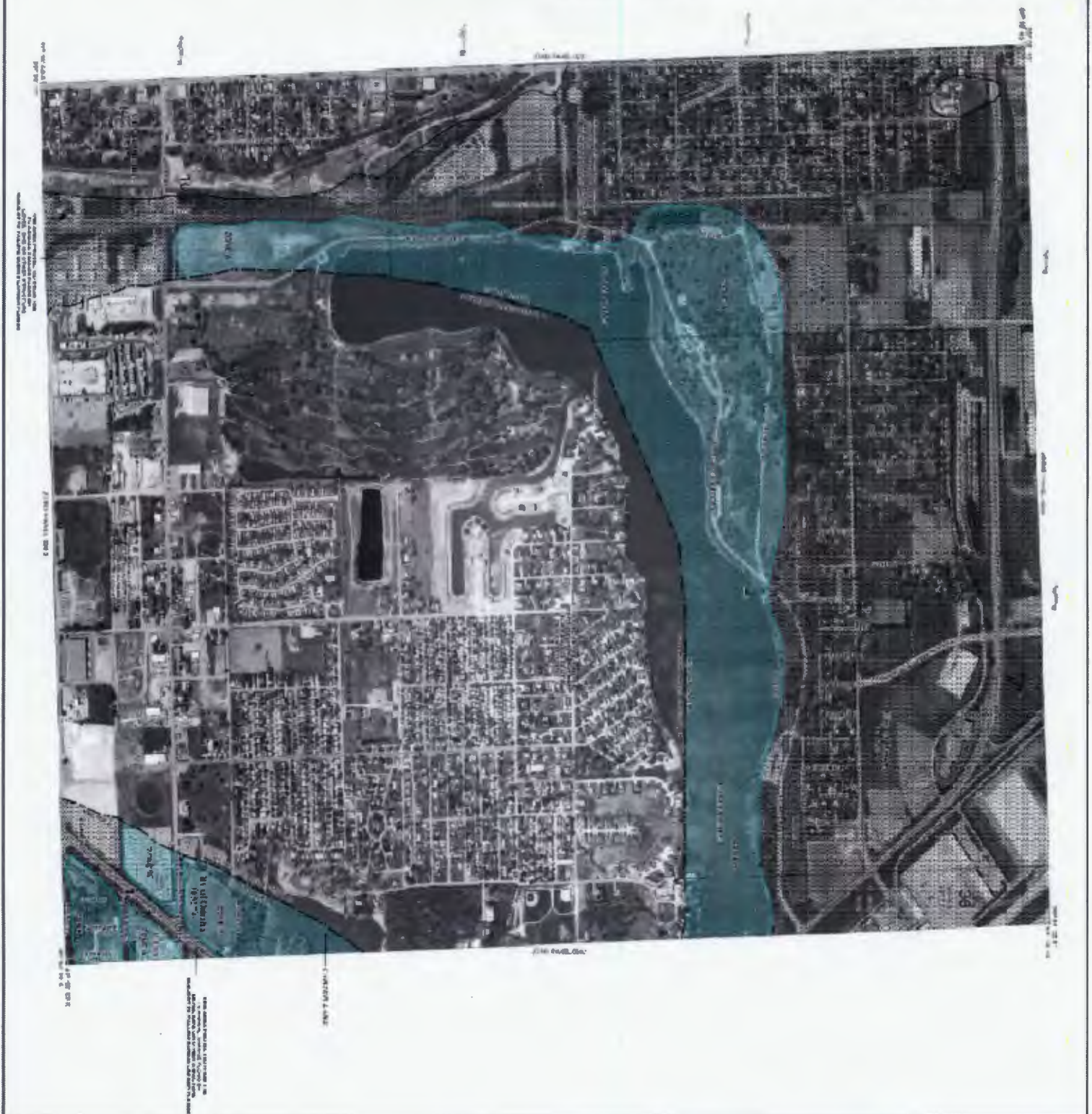
The City's application of NaCl and NaFe(CN) to sections of the streets that are in a floodplain constitutes the open dumping of solid waste in violation of RCRA § 4005(a) and 40 CFR § 257.3-1(a). Krause enjoys visiting Carter Lake and he wants to protect the area for future generations. His suit will seek declaratory and injunctive relief that enjoins the City from applying sodium chloride and sodium ferrocyanide to the sections of Carter Lake Shore Dr. W and Carter Lake Shore Dr. N that are in the floodplain adjacent to Carter Lake.

Sincerely,

A handwritten signature in cursive script, reading "Randall S. Krause".

Randall S. Krause

cc: Gina McCarthy, Administrator of the U.S. Environmental Protection Agency (EPA)
Mark Hague, Acting Regional Administrator for EPA Region 7
David Haldeman, Nebraska Department of Environmental Quality Waste Management
Division Administrator



SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 		A. Signature X <i>Sue Preiner</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: Robert G. Stubbe, Director City of Omaha Public Works Dept. 1819 Farnam St., Suite 600 Omaha, NE 68183		B. Received by (Printed Name) <i>Sue Preiner</i>	C. Date of Delivery <i>3-31-15</i>
2. Article Number (Transfer from service label) <i>RA 729 897 977 US</i>		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
3. Service Type <input type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input checked="" type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	

PS Form 3811, July 2013 Domestic Return Receipt

Registered No. <i>RA729897977US</i>		Date Stamp
To Be Completed By Post Office	Reg. Fee \$11.00	
	Handling Charge \$0.00	
	Postage \$0.00	
	Return Receipt \$2.70	
	Restricted Delivery \$0.00	
Received by		
Customer Must Declare Full Value \$ <i>\$0.00</i>		Domestic Insurance up to \$25,000 is included based upon the declared value. International Indemnity is limited. (See Reverse).
OFFICIAL USE		
To Be Completed By Customer (Please Print) All Entries Must Be In Ballpoint or Typed	FROM	<i>Randall S. Krause</i> <i>1604 S. 22nd St. Apt 515</i> <i>Omaha, NE 68102</i>
	TO	<i>Robert G. Stubbe, Director</i> <i>City of Omaha Public Works Dept.</i> <i>1819 Farnam St., Suite 600</i> <i>Omaha, NE 68183</i>

PS Form 3806, Receipt for Registered Mail Copy 1 - Customer
May 2007 (7530-02-000-9051)
For domestic delivery information, visit our website at www.usps.com

Randall S. Krause
604 S. 22nd Street, Apt. 515
Omaha, NE 68102
Ph. (402) 206-7045
Email: krause_randall@hotmail.com

By Registered Mail, Return Receipt Requested

March 31, 2015

Robert G. Stubbe, Director
City of Omaha Public Works Department
1819 Farnam Street, Suite 600
Omaha, NE 68183

Re: Second Amended Notice of Intent to Sue

Dear Mr. Stubbe:

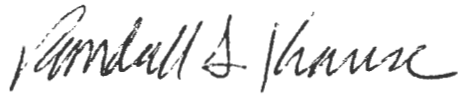
This seconded amended notice supplements the first amended notice of intent to sue dated March 30, 2015 sent to you by Randall S. Krause ("Krause"). Sixty days after you receive this second amended notice, Krause intends to file the citizen suit outlined in the first amended notice. The purpose of this second amended notice is to clearly identify the sections of Carter Lake Shore Dr. W and Carter Lake Shore Dr. N that are in a floodplain.

The attached maps are magnified sections of the map that was included in the first amended notice. The map included in the first amended notice is number 31055C0241H (Panel 0241H) of the Flood Insurance Rate Map for Douglas County, Nebraska prepared by the National Flood Insurance Program for the Federal Emergency Management Agency.

The floodplain boundaries are in blue on the maps. One long and one short section of Carter Lake Shore Dr. W are in a floodplain and all of Carter Lake Shore Dr. N is in a floodplain. The long section of Carter Lake Shore Dr. W that is in a floodplain starts at approximately 41°17'20"N, 095°55'49"W in the south and ends at approximately 41°17'47"N, 095°55'54"W in the north. The short section of Carter Lake Shore Dr. W that is in a floodplain starts at approximately 41°17'59"N, 095°55'52"W in the south and ends at approximately 41°18'01"N, 095°55'51"W in the north.

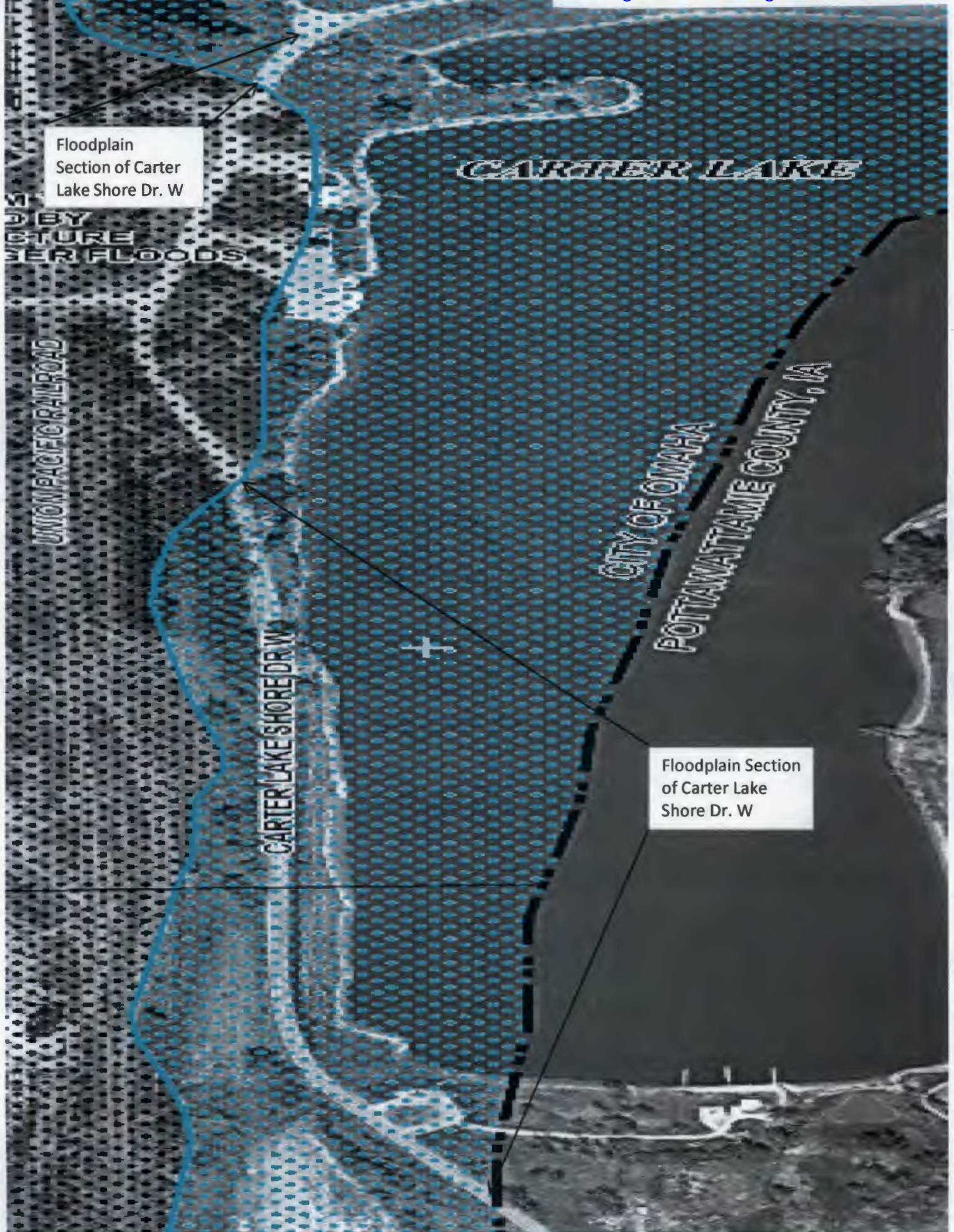
The definitions for "floodplain," "base flood," and "washout" used in the notices come from 40 CFR § 257.3-1(b).

Sincerely,

A handwritten signature in black ink, appearing to read "Randall S. Krause". The signature is written in a cursive, flowing style.

Randall S. Krause

cc: Gina McCarthy, Administrator of the U.S. Environmental Protection Agency (EPA)
Mark Hague, Acting Regional Administrator for EPA Region 7
David Haldeman, Nebraska Department of Environmental Quality Waste Management
Division Administrator





SENDER: COMPLETE THIS SECTION

- Complete Items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Robert G. Stubbbe, Director
City of Omaha
Public Works Department
1819 Farnam St.
Suite 600
Omaha, NE 68183

2. Article Number

(Transfer from service label)

RA 729 898 080 US

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *VP Moore*☒ Agent☐ Addressee

B. Received by (Printed Name)

VP Moore

C. Date of Delivery

4/2/15

D. Is delivery address different from item 1?

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If YES, enter delivery address below:

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3. Service Type

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4. Restricted Delivery? (Extra Fee)

☐ Yes

PS Form 3811, July 2013

Domestic Return Receipt

Registered No. RA729898080US

Date Stamp

To Be Completed
By Post Office

Reg. Fee	\$11.95	
Handling Charge	\$0.00	Return Receipt \$2.00
Postage	\$0.44	Restricted Delivery \$0.00
Received by		

Customer Must Declare Full Value \$ *\$0.00*

Domestic Insurance up to \$25,000 is included based upon the declared value. International Indemnity is limited. (See Reverse).

OFFICIAL USE

To Be Completed By Customer
(Please Print)
All Entries Must Be in Ballpoint or Typed

FROM	<i>Randall S. Krause</i> <i>604 S. 22nd St. Apt. 515</i> <i>Omaha, NE 68102</i>
TO	<i>Robert G. Stubbbe, Director</i> <i>City of Omaha Public Works Dept.</i> <i>1819 Farnam St., Suite 600</i> <i>Omaha, NE 68183</i>

PS Form 3806,

Receipt for Registered Mail

Copy 1 - Customer

May 2007 (7530-02-000-9051)

(See Information on Reverse)

For domestic delivery information, visit our website at www.usps.com®